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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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No. .....

JEFFREY COLE BIGELOW,

Appellant,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Virginia, entered on November 26, 1973, affirming his conviction of violating Section 18.1-63 of the Virginia Code by running in his newspaper an advertisement which contained information about abortion services in New York. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The *per curiam* opinion of the Supreme Court of Virginia, entered following the remand from this Court, is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Appendix, *infra*, at pp. 21a-22a. The order of this Court, vacating the earlier decision of the court below and remand-

ing for further consideration, is reported at 413 U.S. 909 and is set forth in the Appendix, *infra*, at p. 20a. The first opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 and is set forth in the Appendix, *infra*, at pp. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, filed July 15, 1971, is not reported, and is set forth in the Appendix, *infra*, at pp. 14a-15a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on November 26, 1973, and a notice of appeal was filed in that court on December 20, 1973. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. Section 1257(2). The following decision sustains the jurisdiction of this Court to review the judgment by appeal in this case: *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Statute Involved

Virginia Code, Section 18.1-63:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

Questions Presented

1. Whether the conviction of a newspaper editor whose paper runs an advertisement containing information about abortion services violates the First Amendment to the Constitution?

2. Whether Virginia Code Section 18.1-63, prohibiting persons "by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner," from encouraging or prompting the procuring of an abortion, violates the First Amendment on its face or as applied in this case, and is vague and overbroad and thereby violates the First Amendment and the Due Process Clause of the Fourteenth Amendment?

Statement of the Case*

The Appellant, Jeffrey C. Bigelow, was a director, managing editor, and responsible officer of the Virginia Weekly, a newspaper published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly, Volume V, No. 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia. The publication and circulation were the direct responsibility of the Appellant.

The February 8 issue carried the following advertisement on page 2:

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* The facts were stipulated by counsel in the trial court and constituted the record on appeal in the state courts, see App., *infra*, pp. 18a-19a.

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, New York 10022

or call any time

(212) 371-6670 or (212) 371-6650

AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling.

On May 13, 1971, the Appellant was charged with violating Section 18.1-63 of the Code of Virginia which provided as follows:

> If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.[1]

[1] In 1972, that Section was amended to read as follows:

> If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor.

In July, 1971, a non-jury trial on stipulated facts was held in the Circuit Court for Albemarle County.[2] The only evidence consisted of the stipulation, the advertisement, and the June 1971 issue of Redbook Magazine, distributed in Virginia and in Albemarle County and containing abortion information (App., *infra*, pp. 18a-19a). After overruling Appellant's objections to the constitutionality of the statute, the Circuit Court found the Appellant guilty of violating the statute. He was sentenced to pay a fine of $500.00, with $350.00 of the fine suspended, conditional upon Appellant's not violating the statute in the future (App., *infra*, p. 15a).

Appellant timely noticed an appeal to the Supreme Court of Virginia, assigning as error the trial court's ruling that the statute applied to the advertisement, and the overruling of Appellant's First Amendment objections to that statute (App., *infra*, pp. 16a-17a).

Thereafter, the Supreme Court of Virginia granted review, and, in a 4 to 2 decision, upheld the constitutionality of Section 18.1-63 and its applicability to the advertisement in question. The Court first held that the advertisement did encourage or prompt the procuring of abortion within the meaning of the statute, and was not merely informational (App., *infra*, p. 3a). Second, the Court ruled that the prohibition of the statute could con-

[2] This *de novo* trial was technically an appeal from a proceeding held several weeks earlier in the Albemarle County Court, a non-record court.

stitutionally be applied to the newspaper advertisement because of the broad governmental power "to regulate commercial advertising," particularly in the medical health field (App., *infra,* pp. 3a-7a).[3] Finally, the Court ruled that the Appellant lacked standing to challenge the facial overbreadth of the statute because his First Amendment activity "was of a purely commercial nature":

> Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers. (App., *infra,* p. 10a).

The two dissenters found it unnecessary to determine whether the advertisement was "commercial" in the constitutional sense, because they concluded that the Appellant clearly had standing "to challenge as overbroad the criminal statute under which he was convicted" and that the statute "seeks to limit freedom of speech in a vague and impermissibly broad manner." (App., *infra,* p. 11a).

Thereafter, the Appellant filed a timely Jurisdictional Statement with this Court (No. 72-932). On June 25, 1973, the Court entered the following order:

[3] The stipulated facts contain no evidence to support the assumption below that both the advertisement and the advertiser were "commercial." The court so assumed because of the text of the advertisement and because of a discussion appearing in a subsequent issue of Appellant's paper.

> Judgment vacated and case remanded to the Supreme Court of Virginia for further consideration in light of Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S. Ct. 705 (1973); and Doe v. Bolton, 410 U.S. 179, 35 L.Ed. 2d 201, 93 S. Ct. 739 (1973). *Bigelow* v. *Virginia,* 413 U.S. 909 (1973) (App., *infra,* p. 20a).

On November 26, 1973, without calling for further argument, the Supreme Court of Virginia entered a *per curiam* opinion once again affirming the Appellant's conviction. That Court reasoned that the abortion decisions were irrelevant to the issues here, since neither decision "mentioned the subject of abortion advertising" (App., *infra,* p. 22a). In the words of the court below:

> Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction (App., *infra,* p. 22a).

THE QUESTIONS ARE SUBSTANTIAL

I.

Virginia Code Section 18.1-63, Which Prohibits the Advertisement of Information Concerning Abortion Services, Violates the First Amendment on Its Face and as Applied in This Case.

By statute and criminal penalty, Virginia prohibits the dissemination of information which may "encourage" a woman to seek an abortion. As authoritatively construed by the Supreme Court of Virginia, this provision encompasses an advertisement in a newspaper advising Virginia residents of the availability of legal abortions in New York and offering to provide to interested women preliminary information and counseling. Virginia has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965), to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), a decision which this Court has now held to be protected by the constitutional right of privacy, *Roe* v. *Wade*, 410 U.S. 113 (1973).

Virginia has done so, moreover, by punishing a newspaper editor in disregard of the First Amendment's free press guarantee. This Court has repeatedly held that the First Amendment guarantees the right to discuss freely and openly all matters of public concern. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The

Court has also held consistently that newspapers are special beneficiaries of the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *New York Times Co.* v. *Sullivan*, *infra*; *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). These two principles join in this case to cast grave doubt upon the decision of the Virginia courts sustaining the conviction of a newspaper editor because of the controversial content of material printed in his newspaper.

In 1971, when this advertisement appeared in Appellant's newspaper, abortion was an issue of great political, social, and moral debate, and it remains so today. Abortion laws have been the subject of intense controversy in the public forum, the legislatures, political campaigns and in the courts. Indeed, its controversial nature was explicitly recognized in the preface to this Court's decision in *Roe* v. *Wade*:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. 410 U.S. at 116.

Given this setting, the advertisement in question, disseminating information on a matter as controversial as the

availability of abortion information and services, clearly falls within the area of protected speech defined in *Thornhill* v. *Alabama*:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. 310 U.S. at 102.

Moreover, since a woman's decision whether or not to terminate her pregnancy is encompassed by the constitutional right of privacy, *Roe* v. *Wade, supra,* it becomes particularly important that the dissemination of the kind of information contained in the advertisement be facilitated, not suppressed.

Notwithstanding the clear conclusion which should have been compelled by these First Amendment principles, buttressed by the rights recognized in *Roe* v. *Wade,* the Supreme Court of Virginia has once again approved the statute's sweeping prohibition on the publication of abortion information and upheld the Appellant's conviction under that statute. None of the reasons offered below can support such a result.

A. *The Commercial Advertising Doctrine Cannot Support the Appellant's Conviction.*

By invoking the talismanic phrase, "commercial advertising", the Supreme Court of Virginia has allowed the imposition of criminal punishment on a newspaper editor for publishing information of political and social importance, merely because it was imparted in the form of an advertisement and described services apparently available at a cost.

It is the Appellant's position that this advertisement, by virtue of its content and the controversy surrounding its subject matter, cannot be characterized as "commercial" speech and thus entitled to no First Amendment protection. But even assuming *arguendo* that such an advertisement does fall within that category, the Appellant submits that this Court must consider whether speech so labelled is nevertheless entitled to some constitutional protection.

This Court has consistently rejected state attempts to exclude categories of speech from the safeguards of the First Amendment by attaching labels to the kinds of expression involved. See *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973) (hereafter, *Pittsburgh Press*). Rather, the Court has examined the content of the speech, affording protection to the expression of opinion or the communication of information, regardless of whether labels such as "solicitation" (*Button*) or "libel" (*Sullivan*) are sought to be applied to the speech. In this case, if the identical information—describing the legality of abortion in New York and identifying agencies from which further information could be obtained—had been contained in the text of a news article or editorial, the First Amendment would surely have protected appellant against conviction under the statute at issue. See *Pittsburgh Press, supra,* 37 L.Ed. 2d at 680. An artificial application of the commercial speech doctrine should not allow a different result here.

First, it is clear that ". . . speech is not rendered commercial by the mere fact that it relates to an advertise-

ment," *Pittsburgh Press, supra,* 37 L.Ed. 2d at 676, nor by the fact that the newspaper is paid for publishing the advertisement. *Ibid.; New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266. Similarly, First Amendment protection cannot be withheld because the communication involves the solicitation of funds or because of the profit-making nature of the advertiser; the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966); *New York Times Co.* v. *Sullivan, supra; Smith* v. *California,* 361 U.S. 147 (1959); *Jamison* v. *Texas,* 318 U.S. 413 (1943).

Instead, this Court has indicated that the content of the advertisement must be examined to decide whether, on the one hand, it contains "purely commercial advertising" which does "no more than propose a commercial transaction . . ." *Pittsburgh Press, supra,* 37 L.Ed. 2d at 677; *Valentine* v. *Chrestensen,* 316 U.S. 52, 54 (1942), or, on the other hand, it ". . . communicate[s] information, express[es], opinion, recite[s] grievances, protest[s] claimed abuses . . ." or seeks financial support for an important social movement. *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266. But the Court has not identified the criteria by which to determine where on the spectrum between these extremes a particular advertisement will be placed. In *Valentine,* where the commercial speech doctrine originated, the advertisement was a flyer announcing the sale of admission to a submarine on exhibit. In *Pittsburgh Press,* the classified advertisements were characterized as "no more than a proposal of possible employment" and thus "classic examples of commercial speech." 37 L.Ed. 2d at 677.

Here, by contrast, the advertisement contained much more than a proposal for a commercial transaction.

First, it explicitly provided the information that the law in New York had been changed, that abortions there were legal, and that no residency requirements were imposed. At the time the advertisement appeared, such information was vital to persons in Virginia attempting to deal with matters as fundamental " . . . as the decision whether to bear . . . a child." *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453. Surely, such information ranks higher on the scale of First Amendment interests than does information about a submarine tour. See, *Associated Students for the University of California at Riverside* v. *Attorney General,* —— F. Supp. ——, 42 Law Week 2317 (C.D. Cal. 1973) (three-judge court) (holding unconstitutional the federal statute which prohibits the mailing of abortion information).

Similarly, the information that New York had legalized abortions was important not just to persons dealing with pregnancy, but to citizens in Virginia generally. The knowledge that one particular state had altered its laws on such a controversial subject as abortion is likely to have a substantial impact on the attitudes of persons concerning restrictive laws in their own state. Such realization, in turn, may prompt an individual to take steps to change the law. And thus, the statement that "Abortions are now legal in New York" has a direct potential for fueling the process of self-government which is at the heart of First Amendment concern. See, e.g., *Red Lion Broadcasting Co., Inc.* v. *F.C.C.,* 395 U.S. 367 (1969).

Finally, in the circumstances here, the very running of the advertisement can be deemed an implicit editorial endorsement of the legality of abortions and the availability of abortion information and services. The newspaper in

which the advertisement appeared was not a regular, establishment paper, but an "underground" paper, run by a "collective" whose staff members were expressly and openly concerned with the entire abortion issue (App., *infra*, p. 4a). The advertisement itself dealt with an issue which this Court has recognized as an extremely controversial one. Given the content and the context of this advertisement, it can be read as an implicit expression of editorial opinion on the subject matter involved.[4]

In short, to paraphrase the Court in *Pittsburgh Press*, the advertisement here resembles the one in *New York Times Co.* v. *Sullivan* more closely than the handbill in *Valentine* v. *Chrestensen*, and, therefore, cannot be categorized as "purely commercial advertising," beyond the pale of the First Amendment.

But even assuming that this advertisement, by virtue of the implication that the abortion services described involved the payment of a fee, can be categorized as "purely commercial advertising", then this Court must nevertheless consider whether such communication can completely and automatically be denied all First Amendment protection.

The Supreme Court of Virginia, relying primarily on *Valentine* v. *Chrestensen*, ruled that it could be. But *Valentine* was a special case, for not only did it involve advertising in the context of street solicitation, see also, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), but it arose in the context of a contrived attempt to evade a municipal ordinance by the subsequent addition of a protest message to the back of

[4] By the same token, under these circumstances the decision to run this particular advertisement implicated the newspaper's editorial judgment and processes in a way that the decision on placement of employment advertisements in *Pittsburgh Press* did not. See 37 L.Ed. 2d at 677-78.

a business advertisement. The Court's brief, off-hand opinion did not articulate a rationale for the doctrine or indicate whether the presence of some non-commercial, ideational content would entitle the advertisement to some First Amendment protection. Nor has the course of the Court's decisions since then explicitly remedied the deficiency. See *Cammarano* v. *United States*, 358 U.S. 498, 513-14 (1959) (concurring opinion of Justice Douglas).[5]

The issue was raised but not resolved in *Pittsburgh Press*, where the newspaper argued that commercial speech should be accorded at least some constitutional protection. The Court's response was that whatever the argument's merit in other contexts, it was unpersuasive there because the advertisement, which facilitated prohibited sex discrimination in employment, was "not only commercial activity, it is *illegal* commercial activity. . . . " 37 L.Ed. 2d at 678. As the majority observed:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. *Id.* at 679.[6]

[5] Shortly after *Valentine* v. *Chrestensen*, in a series of cases involving the Jehovah's Witnesses, this Court carved out an exception from regulation for religious activities with a commercial aspect. *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Jamison* v. *Texas*, 318 U.S. 413 (1943). Those cases appeared to limit the application of the doctrine to purely "commercial activity without any ideational content. But *cf.*, *Breard* v. *Alexandria*, 341 U.S. 622 (1951).

[6] The same analysis was employed in *Hunter* v. *United States*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), heavily

In this case, by contrast, the information and services offered by the advertisement were not illegal and, indeed, have since been held to be constitutionally protected. With the obstacle of illegality absent, this case affords an appropriate opportunity for resolution of the issue left open in *Pittsburgh Press.*[7]

Moreover, resolution of the question is particularly important, and inflexible application of the commercial speech doctrine is particularly dangerous, where the medium regulated is a newspaper. With the exception of this Court's sharply divided decision in *Pittsburgh Press,* the Court has traditionally and consistently singled out newspapers for special First Amendment protection. See, e.g., *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Grosjean* v. *American*

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relied upon by the court below. In *Hunter,* the commercial advertising doctrine was applied to justify an injunction against advertisements which violated federal statutory prohibitions against racial discrimination in housing. But there, as in *Pittsburgh Press,* the advertisement was not only purely commercial, but was an integral part of illegal conduct in violation of express, national, public policy.

[7] Several courts and commentators have urged that the rigid commercial speech doctrine employed below be relaxed to allow some First Amendment protection for advertising. For example, in *United States* v. *Pellegrino,* 467 F.2d 41 (9th Cir. 1972), the Court of Appeals observed:

> We cannot agree with the Government that advertising is devoid of literary, artistic or other social value and accordingly is less deserving of First Amendment protection than the substance of that which is advertised. Advertising performs an important First Amendment function in aid of communication. *Id.* at 45.

See also, *Hiett* v. *United States,* 415 F.2d 664, 672 (5th Cir.), *cert. denied,* 397 U.S. 936 (1970); see generally, Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965); Redish, *The First Amendment in the Market Place: Commercial Speech and Values of Free Expression,* 39 Geo. Wash. L. Rev. 429 (1971).

Press Co., 297 U.S. 233 (1936); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *New York Times Co.* v. *Sullivan, supra; Mills* v. *Alabama,* 384 U.S. 214 (1966); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971). Thus, the reliance below on decisions employing the "commercial" speech doctrine in the area of television and radio broadcasting is misplaced. Decisions such as *New York State Broadcasters Association* v. *United States,* 414 F.2d 990 (2d Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); *Banzhaff* v. *FCC,* 405 F.2d 1082 (D.C. Cir. 1968); *cert. denied, sub nom. Tobacco Institute Inc.* v. *FCC,* 396 U.S. 842 (1969) and *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom., Capital Broadcasting Co. et al.* v. *Acting Attorney General, et al.,* 405 U.S. 1000 (1972), were premised either on the federal government's broader power to regulate the electronic media or on a specific, historic congressional policy over the substantive problem, for example, the use of government regulated instrumentalities to conduct lotteries. These decisions merely reflect the distinctions between free print media and regulated electronic media; they cannot be invoked as the basis for suppressing the former.

To allow the commercial advertising doctrine to serve as the basis for sustaining the Appellant's conviction is to sanction "a disturbing enlargement" of that doctrine "and a serious encroachment on the freedom of press guaranteed by the First Amendment." *Pittsburgh Press supra,* 37 L.Ed. 2d at 681 (Burger, Ch. J., dissenting). If the doctrine is thought to allow criminal punishment of a newspaper editor for running an advertisement supplying information about medical services whose very provision was the subject of great controversy, then the continued vitality

of the commercial advertising exception from First Amendment protection must be re-examined.

B. *The State's Authority to Regulate in the Medical Health Field Cannot Sustain the Conviction.*

The Court below ruled that the power to regulate commercial advertising is "especially applicable where, as here, the advertising relates to the medical-health field." There is no quarrel that the state has the power to regulate the provision of medical services and advertising by those who provide such services. See, *e.g., Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955). But the question, as always, is whether such regulation goes forward in a manner consonant with the First Amendment or other constitutional guarantees. In *NAACP* v. *Button, supra,* where Virginia relied on its authority to regulate an analogous area, the provision of legal services, the Court remarked:

> "... it is no answer ... to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. at 438-39.[8]

[8] Cases involving advertising by opticians or dentists are somewhat inapposite, because such regulation usually applies to the profession, not to the press. In *Head* v. *New Mexico Board,* 374 U.S. 424 (1963), this Court upheld an injunction against a New Mexico newspaper and radio station, prohibiting advertisements of prices by a Texas optometrist. But this Court expressly refused to pass on the First Amendment issues because they had not been raised in the state courts, 374 U.S. at 432-33, n.12. See, *Pittsburgh Press, supra,* 37 L.Ed. 2d at 678, n.10.

Moreover, this Court's abortion decisions altered considerably the kinds of interests which the state can regulate in this particular aspect of the medical-health field. Now that the individual's decision with respect to abortion has been afforded systematic constitutional protection, the availability of information to help inform that decision becomes even more important. See *Associated Students for the University of California at Riverside* v. *Attorney General, supra.* Similarly, while *Roe* v. *Wade* recognized that the state has " . . . a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," an interest which "extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise," 410 U.S. at 150, the statute here is not directed at securing those interests. It does not regulate those who perform abortions, it punishes those who provide information about abortion services.[9] Nor is the statute confined, as written or authoritatively construed, to those who provide such information and services for a fee; it would pro-

[9] The Court below relied, in part, on a New York statute regulating profit-making abortion service agencies. See, *S.P.S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1370, 1373 (S.D.N.Y. 1971). But there, the state Attorney General conceded that the statute did not prohibit the agency from disseminating information about abortion services or charging a fee for providing such information. 333 F. Supp. at 1372. All that was regulated was fee-splitting and referral services:

> Section 4401 does not prohibit the plaintiffs from disseminating information for a fee concerning the availability of health care facilities. It merely prohibits them from referring or recommending persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment. 333 F. Supp. at 1376.

hibit an identical advertisement for a non-profit abortion information agency such as Planned Parenthood. The statute here reaches beyond the area of valid state interests and does so by means which lack the precision required when First Amendment rights are involved.

More particularly the statute and its application here run afoul of two First Amendment requirements. First, it draws no distinctions in terms of whether the abortion services are legal or illegal, within the state or outside it, or recommended by doctor or husband. In *Hiett* v. *United States,* 415 F.2d 664 (5th Cir.) *cert. denied,* 397 U.S. 936 (1970), the court held invalid, on First Amendment grounds, a statute which prohibited use of the mails to distribute information about obtaining a foreign divorce. The court ruled that the statute sought to prevent fraudulent divorces in a vague and uncertain manner which improperly prohibited valid legal consultation about a vitally important subject like the marital relationship. The statute here suffers comparable defects. And in *People* v. *Orser,* 31 Cal. App.3d 537, 107 Cal. Rptr. 458 (1st Dist. Ct. of App., 1973), a statute which prohibited the advertisement of abortion services was invalidated on similar grounds:

> Section 601, however, does not distinguish between abortions which are permitted and those which are not. Its broad language encompasses activity which is legal and activity which is illegal. By its terms it proscribes the advertising or publication of information concerning the obtaining of abortions permitted by law. It makes no distinction between the dissemination of advertising which is truthful and which calls attention to the means by which a legal abortion may be obtained and the advertising which calls attention to the means of obtaining an illegal abortion. 31 Cal. App.3d at 463.

Second, the application of the statute to this advertisement conflicts with the doctrine that speech may be prohibited only when there is an immediate danger that words will directly bring about the substantive evil which the state may prevent. See *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Here, the advertisement could not, in the First Amendment sense, incite a woman to obtain an abortion; it merely informs her where she can obtain additional information about abortions in another state. *Mitchell Family Planning Inc.* v. *City of Royal Oak,* 335 F. Supp. 738 (E.D. Mich. 1972) is directly in point. The court there invalidated, as violative of First Amendment principles, a Michigan ordinance used to prohibit billboard advertisements giving information about abortion services in New York. The information provided by the billboard, virtually identical with the advertisement here, did not pose an imminent danger to any valid state interest.[10]

[10] In this regard, it is interesting to note that the Ordinance in *Pittsburgh Press* did not apply to discriminatory advertisements placed in the paper by employers outside the City of Pittsburgh.

II.

Appellant Has Standing to Argue the Overbreadth of Virginia Code Section 18.1-63.

The overbreadth of this statute, simultaneously prohibiting expression which arguably can be proscribed and that which may not, is apparent. By its terms, it prohibits a speech urging that women have a right to obtain an abortion; it prevents a husband from discussing the possibility of an abortion with his pregnant wife; it prevents a Virginia doctor from suggesting that a patient obtain a legal abortion in Virginia or elsewhere; it suppresses abortion information supplied by a non-profit, non-commercial agency; in fact, it prohibits Appellant from writing and publishing an editorial which could be said to encourage abortion. It simply "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). See, *Hiett* v. *United States, supra; People* v. *Orser, supra.*

The court below, explicitly refusing to give the statute a limiting construction, compare, *New York State Broadcasting Association* v. *United States, supra*, 414 F.2d at 997, held that because Appellant's activity was "commercial," he lacked standing to challenge the statute's overbreadth.[11] In reaching this conclusion, the Supreme Court of Virginia relied exclusively and improperly on *Breard* v. *Alexandria*, 341 U.S. 622 (1951). *Breard* involved an ordinance pro-

[11] The court did state *in dictum* that it would not interpret the statute to encompass some of the suggested hypothetical applications, but the holding rested on the conclusion that the Appellant lacked standing to raise these arguments (App., *infra*, pp. 9a-10a).

hibiting uninvited soliciting by door-to-door salesmen of magazine subscriptions. In response to a First Amendment challenge, this Court observed: "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." *Id.* at 641. Even under this reasoning, the Appellant, as a member of the press, was entitled to mount an overbreadth challenge to this statute.

More importantly, the decision below simply ignored this Court's contemporary overbreadth doctrine that one whose own conduct is not protected may nevertheless raise a challenge to an overly broad statute: "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). As the Court explained last Term, in the First Amendment area the normal standing rules are relaxed in order to enforce the requirement that statutes which regulate expression are narrowly and precisely drawn:

> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L.Ed. 2d 830, 839-40 (1973).

And allowing an overbreadth challenge is particularly appropriate where, as here, the statute directly regulates expression.

Finally, the employment of an overbreadth analysis is not undermined by the recent change in the statute. The amendment in no way narrowed the reach of the statute, but simply added a prohibition on "the use of a referral agency for profit" to "encourage or promote the processing of an abortion. . . . " See, *supra*, pp. 4-5, n. 1. Virginia still provides that, "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, . . . or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor." And thus since Virginia still claims the authority to punish protected expression, "manifestly, strong medicine" must be administered. *Broadrick* v. *Oklahoma, supra*, 37 L.Ed. 2d at 841.

III.

The Decision Below Conflicts With Other Lower Court Rulings Invalidating Prohibitions on Providing Abortion information.

In at least four other cases, state and federal courts have invalidated enactments which prohibited the dissemination of information about legal abortion services.

In *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), the court invalidated, on First Amendment grounds, a local Michigan ordinance which prohibited billboard advertisements giving information about abortion services in New York. In *People* v. *Orser, supra*, a California appellate court employed a First Amendment analysis to overturn the convictions of persons who had placed abortion services advertisements in a local paper. Similarly, at least two cases have invalidated the federal statutory ban on using the mails to distribute information concerning abortions. In *The Comprehensive Family Planning and Theraputic Abortion Association, et al.* v. *Mitchell*, —— F. Supp. —— (W.D. Okla., No. Civ. 71-725, March 12, 1973), the District Court, following this Court's abortion decisions and on its own motion, determined that the issues no longer even required the convening of a three-judge court. More recently, a similar result was reached by a three-judge court in California which ruled that the mailing of unsolicited advertisements and information about contraceptives or abortions could not constitutionally be prohibited. *Associated Students for the University of California at Riverside* v. *Attorney General*, —— F. Supp. ——, 42 Law Week —— (C.D. Cal. 1973) (three-judge court). In that case, the Government did not even defend the constitutionality of the statute.

The conflict between these cases and the decision below require that jurisdiction be noted. Allowing this conviction to stand not only offends the First Amendment, but it also will have the effect of inhibiting the dissemination of information necessary for individuals to make those decisions about abortion which this Court has held to be constitutionally protected.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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February 25, 1974

• Attorneys for Appellant wish to thank Wayne Outten, a third-year student at New York University School of Law, for his assistance in the preparation of this Statement.

APPENDIX

Opinion of the Supreme Court of Virginia

Present:

Snead, C.J., I'Anson, Carrico, Harrison, Cochran, and Harman, JJ.

Richmond, Virginia, September 1, 1972

Record No. 7972

JEFFERY C. BIGELOW, ETC.

—v.—

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
David F. Berry, Judge

OPINION BY JUSTICE HARRY L. CARRICO

Jeffery C. Bigelow[1] was tried by the court, sitting without a jury, and convicted of encouraging or prompting the procuring of abortion by publication, advertisement, sale, or circulation of the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code § 18.1-63. He was fined $500, $350 of which was suspended upon condition that he not further violate § 18.1-63. We granted him a writ of error.

The case comes before us upon a stipulation of fact and certain exhibits. Bigelow had direct responsibility for the publication and circulation in Albemarle County of the

[1] Also shown as *Jeffrey* C. Bigelow.

February 8, 1971 issue of the Virginia Weekly. The issue contained the following advertisement:

UNWANTED PREGNANCY

LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

The questions presented on this appeal are whether Bigelow violated Code § 18.1-63 by publishing the advertisement, and if so, whether the statute is constitutional under the First Amendment to the Constitution of the United States and Article 1, § 12, of the Constitution of Virginia.

Section 18.1-63, Code of 1950, as amended, 1960 Repl. Vol., provided:[2]

[2] Section 18.1-63 was amended by Acts of 1972, ch. 725, at 1019.

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."

Bigelow first contends that the advertisement was not in violation of § 18.1-63. He says the advertisement did not encourage or persuade women to obtain abortions, but instead merely informed those who had already rejected their pregnancies that services were available for legal abortions. We do not agree. The language of the advertisement clearly exceeded an informational status when it offered to make all arrangements for immediate placement in accredited hospitals and clinics at low cost. It constituted an active offer to perform a service, rather than a passive statement of fact. By offering to arrange for the placement of pregnant women, the advertisement amounted to an encouragement or a prompting to procure an abortion, and thus was violative of the language and intent of Code § 18.1-63.

This brings us to the question of the constitutionality of Code § 18.1-63. Bigelow contends that the statute infringes the First Amendment rights of free speech and free press and is, therefore, unconstitutional.

We reject this contention. We are not dealing here with the traditional press role of disseminating information and communicating opinion, but with a commercial advertisement promoting the services of an abortion referral agency. That this is true is shown by the advertisement itself and by an exhibit which is in the record.

The advertisement holds out to pregnant women the offer, by the Women's Pavilion, to make all arrangements

and to secure immediate placement in a hospital or clinic for an abortion. All this, the advertisement says, will be done "at low cost." The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed.

That is enough by itself, but an exhibit in the record in the form of one of the issues of the publication in question provides additional proof. The May-June, 1971 issue of the Virginia Weekly, in an article entitled "abortion rap," reported the arrest of staff members for publishing in the February issue the advertisement in dispute. In the same article, it was stated, in apparent apology, that the "*Weekly* collective has since learned that this abortion agency," obviously meaning the Women's Pavilion, "as well as a number of other commercial groups are charging women a fee for a service which is done free by Women's Liberation, Planned Parenthood, and others."

The question becomes whether such an advertisement may be constitutionally prohibited by the state. We answer the question in the affirmative.

In a case directly in point, *United States* v. *Hunter*, 459 F.2d 205 (4th Cir. 1972), the government sought to enjoin Hunter, a newspaper publisher, from carrying advertisements in his paper allegedly violative of a section of the Civil Rights Act of 1968, which prohibits advertising of an intent to discriminate in the sale or rental of a dwelling. 42 U.S.C. § 3604(c). The district court held that the Act did not contravene the First Amendment and that a court might, therefore, constitutionally enjoin a newspaper from

printing advertisements in violation of the statute. In affirming, the Fourth Circuit stated:

> "The [district] court's conclusion is supported by an unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context. It is now well settled that, while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.'" 459 F.2d at 211 (footnotes omitted).

In reply to Hunter's contention that the above rule did not apply to newspapers, the court stated that "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." 459 F.2d at 212. And at another point the court said that if "an individual advertiser has no constitutional or statutory right to circulate a discriminatory housing advertisement, a newspaper can stand in no better position in printing that unlawful advertisement at the individual's request." 459 F.2d at 214.

Hunter is but one of numerous cases upholding the power of government to regulate commercial advertising. The source of authority for these decisions is *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). In that case, the United States Supreme Court had before it the question of the constitutionality of a New York City ordinance which forbade distribution in the streets of commercial and business adver-

tising matter. Chrestensen had attempted to distribute a double-faced handbill, one side advertising an exhibit for profit and the other expressing protest against the city's efforts to thwart the exhibit. The police interfered with the distribution, and Chrestensen sought to enjoin Valentine, the police commissioner, from such interference. The district court granted the injunction, and the circuit court affirmed. However, the Supreme Court reversed, holding that the First Amendment imposed no restraint upon proscription by states and localities of purely commercial advertising and that it made no difference that one side of Chrestensen's handbill contained "matter proper for public information." 316 U.S. at 55.

Other cases upholding the right of government to regulate commercial advertising are: *New York State Broadcasters Ass'n* v. *United States,* 414 F.2d 990, 998 (2d Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970); *Banzhaf* v. *F.C.C.,* 132 U.S. App. D.C. 14, 31-35, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute, Inc., et al.* v. *F.C.C.,* 396 U.S. 842 (1969); *Capital Broadcasting Company* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom. Capital Broadcasting Co. et al.* v. *Acting Attorney General et al.,* 405 U.S. 1000 (1972); *Wirta* v. *Alameda-Contra Costa Transit District,* 64 Cal. Rptr. 430, 434, 434 P.2d 982, 986 (1967).

The rule that the First Amendment does not prohibit government regulation of commercial advertising is especially applicable where, as here, the advertising relates to the medical-health field. *Patterson Drug Company* v. *Kingery,* 305 F. Supp. 821, 825 (W.D. Va. 1969) (three-judge court); *United Advertising Corp.* v. *Borough of Raritan,* 11 N.J. 144, 152, 93 A.2d 362, 366 (1952); *Planned*

Parenthood Committee v. *Maricopa County,* 92 Ariz. 231, 240, 375 P.2d 719, 725 (1962).

Regulations affecting advertising in the medical-health field have also been attacked on Fourteenth Amendment grounds. The attacks have been rejected. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 490 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608, 610-11 (1935); *Patterson Drug Company* v. *Kingery, supra,* 305 F. Supp. at 823-25; *Ritholz* v. *Commonwealth,* 184 Va. 339, 369, 35 S.E.2d 210, 224 (1945); *Goe* v. *Gifford,* 168 Va. 497, 501-03, 191 S.E. 783, 784-85 (1937).

Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient.

One need only look at the experience in New York State following its legalization of abortion to become convinced of the necessity for and the reasonableness of the advertising legislation in question. In *S.P.S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1373 (S.D.N.Y. 1971) (three-judge court), the court upheld, against First and Fourteenth Amendment attacks, a New York statute prohibiting the operation of for-profit abortion referral agencies. The opinion discloses that one such agency received from 200 to 400

telephone calls per day, mostly from out-of-state, and that 95 percent of the telephone calls of another agency came from nonresidents. One agency collected $5,500,000 in the first eight months after abortion was legalized, of which sum $1,200,000 was the agency's portion. There was evidence of substantial advertising by the for-profit agencies. One had an advertising budget of $1,000 a week and had carried advertisements in approximately 100 college newspapers throughout the country.

S.P.S. Consultants and two other New York cases, *State* v. *Mitchell*, 321 N.Y.S. 2d 756 (1971), and *State* v. *Abortion Information Agency, Inc.*, 323 N.Y.S. 2d 597 (1971), disclose that the for-profit agencies in New York were acting as middlemen for doctors, were soliciting patients for and splitting fees with doctors, and were engaging in the practice of medicine, all in violation of the law. The cases also show that the personnel of the referred agencies lacked medical training and that there was no "follow up procedure" after abortions were performed.

The *Mitchell* case from New York is interesting for another reason. The Martin Mitchell involved in that case apparently was the same Martin Mitchell who was also involved in *Mitchell Family Planning Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972), a case relied upon here by Bigelow. In the Michigan case, the court struck down a city ordinance banning the advertising of "any information concerning the producing or procuring of an abortion," which is unlike the statute in question here. Mitchell had displayed an ad on a billboard merely offering "Abortion Information" and giving two New York telephone numbers, an advertisement quite different from the one published by Bigelow. The court stressed the fact that Mitchell's billboard offered only information, and its opinion indicated that the services to be offered by Mitchell were innocuous. But the New York case shows clearly the true nature of Mitchell's operation.

It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra,* 294 U.S. at 612-13.

This would conclude the question except for a further contention advanced by Bigelow that Code § 18.1-63 is unconstitutional because of overbreadth. Here, he argues that the statute not only encompasses non-protected expression, but in its overbreadth also sweeps within its scope speech which is clearly protected by the First Amendment. He says that the statute is so broad that a doctor who advises a patient that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a "right to abortion" would all be guilty of misdemeanors.

The Attorney General argues that Bigelow lacks standing to assert the hypothetical rights of others. Relying on *DeFebio* v. *County School Board*, 199 Va. 511, 514, 100 S.E.2d 760, 762-63 (1957), the Attorney General states that the applicable rule is that one who challenges the constitutionality of a statute must show that he himself has been injured or threatened with injury by its enforcement.

Bigelow insists that he does have standing and relies upon *Owens* v. *Commonwealth*, 211 Va. 633, 179 S.E.2d 477 (1971). There, we held unconstitutional on its face, because overbroad, the definition of unlawful assembly as contained in

Code § 18.1-254.1(c). The Attorney General contended in that case that Owens lacked standing to challenge the constitutionality of the statute. We said, citing *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963), that "where First Amendment liberties are involved, persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." 211 Va. at 638-39, 179 S.E.2d at 481.

While we would not interpret Code § 18.1-63 to encompass the hypothetical situations posed by Bigelow, we need not rest our decision upon that ground. Instead, we hold that *Owens* and *N.A.A.C.P.* v. *Button* are not applicable here. As we have previously demonstrated, Bigelow's activity was of a purely commercial nature. This being so, the rule to be followed is that applied in *Breard* v. *Alexandria*, 341 U.S. 622 (1951). There, a door-to-door salesman of magazines was convicted under an ordinance of the city of Alexandria, Louisiana, which prohibited such a salesman from going in and upon private residences for the purpose of soliciting orders for the sale of goods without prior consent of the owners or occupants. The Supreme Court affirmed. In answer to the contention that the ordinance abridged First Amendment freedom of speech and press, the court stated: "Only the press or oral advocates of ideas could urge this point. It [is] not open to the solicitors for gadgets or brushes." 341 U.S. at 641.

Thus, where, as here, a line can be drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. So we deny Bigelow standing to assert the rights of doctors, husbands, and lecturers.

For the reasons assigned, the judgment of the trial court will be affirmed.

Affirmed.

I'Anson and Cochran, JJ., dissenting

We dissent. We conclude that § 18.1-63 is unconstitutionally vague and overbroad. In our view it is unnecessary to decide whether the advertisement is "commercial" in a constitutional sense. *See New York Times* v. *Sullivan*, 376 U.S. 254 (1964). In any event Bigelow has standing to challenge as overbroad the criminal statute under which he was convicted. *Owens* v. *Commonwealth*, 211 Va. 633, 179 S.E.2d 277 (1971). The language of the statute does not purport to regulate commercial advertising only but sweeps within its scope any person who "encourage[s] or prompt[s] the procuring of an abortion" by "publication, lecture, advertisement . . . or in any other manner." For this reason *Breard* v. *Alexandria*, 341 U.S. 622 (1951), a decision which upheld the validity of an ordinance which regulated the *conduct* of door-to-door solicitors rather than their freedom of speech, is inapposite here. Section 18.1-63 seeks to limit freedom of speech in a vague and impermissibly broad manner. Moreover, no distinction is made between legal and illegal abortions (an oversight recently remedied by amendment).

We would reverse the conviction.

Notice of Appeal

[Filed November 27, 1972]

IN THE

SUPREME COURT OF VIRGINIA

Record No. 7972

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Albermarle County

DAVID F. BERRY, Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey C. Bigelow, appellant in the above-stated case, hereby appeals to the Supreme Court of the United States from the final Judgment of the Supreme Court of Virginia entered on September 1, 1972.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Date:

F. GUTHRIE GORDON, III
JOHN C. LOWE
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of this Notice of Appeal were mailed, postage prepaid to Charles R. Haugh, Esquire, Commonwealth Attorney for Albemarle County, 435 Park Street, Charlottesville, Virginia, and Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219, on this 27th day of November, 1972.

/s/ F. GUTHRIE GORDON, III

Judgment of Conviction

VIRGINIA:

AT A CIRCUIT COURT HELD FOR THE COUNTY OF ALBEMARLE ON THE 15TH DAY OF JULY, 1971

APPEAL FROM COUNTY COURT #2483

COMMONWEALTH OF VIRGINIA

vs.

JEFFERY C. BIGELOW

Present:—Hon. David F. Berry

On this the 15th day of July, 1971 came the Attorney for the Commonwealth and the defendant, Jeffery C. Bigelow, and came also his attorney, John C. Lowe.

Whereupon the accused was arraigned and pleaded NOT GUILTY to the charge in said warrant.

And after being advised by the Court of his right to trial by jury, and the accused knowingly and voluntarily waived trial by jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury and having heard the evidence and argument of counsel, doth find the accused guilty of "by publication advertisement, sale or circulation of the Virginia Weekly, encourage or prompt the procuring of abortion in violation of Sec. 18.1-63 of the Code of Virginia" as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant pay, and the Commonwealth recover a fine of $500.00 and costs of $..... The Court doth however suspend $350.00 of said fine, conditioned upon no further violation of Section 18.1-63 of the Code of Virginia.

Thereupon, the defendant was allowed to depart.

DAVID F. BERRY, *Judge*

Notice of Appeal and Assignments of Errors

VIRGINIA:

IN THE

CIRCUIT COURT OF ALBEMARLE COUNTY

COMMONWEALTH OF VIRGINIA

v.

JEFFREY C. BIGELOW

To: MRS. SHELBY MARSHALL
Clerk, Circuit Court of Albemarle County
County Office Building
Charlottesville, Virginia

NOTICE OF APPEAL

Notice is hereby given that Jeffrey C. Bigelow, now standing convicted, will apply to the Supreme Court of Virginia for a Writ of Error to review and set aside his conviction of violation of Section 18.1-63 of the Code of Virginia as amended for urging or prompting the procuring of an abortion by publication and circulation of an advertisement in a newspaper in Albemarle County, Virginia, for which Jeffrey C. Bigelow was sentenced to a $500.00 fine.

ASSIGNMENTS OF ERROR

Now comes the Defendant, Jeffrey C. Bigelow, now standing convicted, and assigns as error in his conviction as stated above, the following:

1. The court erred in ruling that the abortion ad in the February 8 issue of the Virginia Weekly violated Section 18.1-63 of the Code of Virginia.

2. The Court erred in overruling Defendant's contention that Section 18.1-63 of the Code of Virginia is void under the Constitution of Virginia and the Constitution of the United States, and in particular is in violation of the First Amendment of the Constitution of the United States.

JEFFREY C. BIGELOW
By counsel

JOHN C. LOWE
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia 22903

Stipulation of Facts

VIRGINIA:

IN THE

CIRCUIT COURT OF ALBEMARLE COUNTY

COMMONWEALTH OF VIRGINIA

v.

JEFFREY C. BIGELOW

The following facts are stipulated for purpose of appeal in the above styled case:

Jeffrey C. Bigelow was a director, managing editor, and responsible officer of the Virginia Weekly, a newspaper published by the Virginia Weekly Associates of Charlottesville, Virginia, and distributed in the Charlottesville area.

On February 8, 1971, the Virginia Weekly Volume V, number 6, was published and circulated in Albemarle County, Virginia, and in particular on the grounds of the University of Virginia, which is in the jurisdiction of Albemarle County, and said publication and circulation were the direct responsibility of Jeffrey C. Bigelow.

The February 8 Issue of the Virginia Weekly carried an advertisement on page 2, which is in evidence in this case, and said ad is incorporated into this factual stipulation by reference thereto.

There is no contest on the factual issue of the printing of the advertisement. The only issue is in whether the advertisement violates Virginia law, and if so, whether Virginia law is unconstitutional.

Also in evidence is a June, 1971 issue of Redbook magazine, carrying abortion information from across the United States. Redbook magazine is distributed in Virginia and in Albemarle County.

F. GUTHRIE GORDON, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia
Counsel for
Jeffrey C. Bigelow

DOWNING L. SMITH
Downing L. Smith
Commonwealth's Attorney
for Albemarle County
301 County Office Bldg.
Charlottesville, Virginia

Remand Order of the United States Supreme Court

SUPREME COURT
OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 25, 1973

Melvin L. Wulf, Esq.
ACLU Foundation
22 East 40th St.
New York, N. Y. 10016

RE: BIGELOW v. VIRGINIA,
No. 72-932,

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The judgment is vacated and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Roe* v. *Wade*, 410 U.S. 113 (1973); and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Very truly yours,

MICHAEL RODAK, JR., *Clerk*

By /s/ HELEN TAYLOR, (Mrs.)
Assistant Clerk

D. PATRICK LACY, JR., Esq.
Asst. Attorney General of Va.
Supreme Court—Library Bldg.
1101 East Broad St.
Richmond, Va. 23219

Opinion of the Supreme Court of Virginia, on Remand

Present: All the Justices

Record No. 7972

JEFFERY C. BIGELOW, ETC.

—v.—

COMMONWEALTH OF VIRGINIA

PER CURIAM

Richmond, Virginia, November 26, 1973

UPON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

On September 1, 1972, this Court affirmed, by opinion, the conviction of Jeffery C. Bigelow for encouraging or prompting the procuring of abortion by an advertisement in the Virginia Weekly, a newspaper published in Charlottesville, in violation of Code § 18.1-63. 213 Va. 191, 191 S.E.2d 173.

On July 25, 1973, the Clerk of this Court received from the Supreme Court of the United States a copy of an order dated July 23, 1973, entered in the Bigelow case, voiding the judgment of this Court and remanding the case "for further consideration in light of Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973)."

The decision in *Roe* v. *Wade*, cited in the order of the Supreme Court, declared unconstitutional Texas statutes which made it a crime to procure, or to attempt to procure, an abortion. *Doe* v. *Bolton* declared unconstitutional portions of Georgia statutes making abortion a crime except in certain stated instances. Both decisions were grounded upon the Fourteenth Amendment. Neither mentioned the subject of abortion advertising.

Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction.

Affirmed

Notice of Appeal

[Filed December 20, 1973]

IN THE

SUPREME COURT OF VIRGINIA

Record No. 7972

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
DAVID F. BERRY, *Judge.*

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jeffrey C. Bigelow, the Appellant in the above stated case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia entered on November 26, 1973.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Date:

December 17, 1973

/s/ F. GUTHRIE GORDON, III

JOHN C. LOWE
1111 West Main Street
Charlottesville, Virginia 22903
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of this Notice of Appeal were mailed, postage prepaid to Charles R. Haugh, Esquire, Commonwealth Attorney for Albemarle County, 435 Park Street, Charlottesville, Virginia, and Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219 on this 17th of December, 1973.

/s/ F. GUTHRIE GORDON, III